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No. 95-1559

Supreme Court, U.S.
FILED
MAR 25 1996
CLERK

In The
Supreme Court Of The United States
October Term, 1995

WENDY R. HICKAM,
Petitioner

v.

STATE OF CONNECTICUT,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CONNECTICUT

PETITION FOR WRIT OF CERTIORARI

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70 pp

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

1. Under *Halper v. United States*, 490 U.S. 435 (1989), did the Court intend to provide that a civil sanction will be considered punishment unless it can be said that it is solely remedial or did the Court intend to provide that a civil sanction will not be considered punishment unless it can be said that it is solely punitive?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW v

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 15

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

TABLE OF AUTHORITIES

CASES:

State v. Wendy R. Hickam,
235 Conn. 614 . . . . . v, 5, 8, 10, 13

Austin v. United States, 509 U.S. ____,
113 S.Ct. 2801 (1993) 3, 4, 6-14

Department of Revenue of Montana v. Kurth Ranch,
511 U.S. ___, 114 S.Ct. 1937 (1994) . . 4, 8-12, 14

Halper v. United States, 490 U.S. 435 (1989) . . . . i, 3-14

State v. Wendy R. Hickam,
13 Conn.L.Rptr. 18, 571 (1995) v

State v. Wendy R. Hickam, 235 Conn. 614 v

United States of America v. Donnie Virgil,
Case No. CR-95-TMP-225-E 11

United States of America v. Guy Jerome Ursery,
59 F.3d 568 (6th Cir. 1995) 12, 13

United States of America v. Kenneth Johnson,
767 F.Supp. 389 11

United States v. Hudson,
14 F.3d 536 (10th Cir. 1994) 14

Butler v. Dept. Of Public Safety & Corr.
609 So.2d 790 (La. 1992) 10

State v. Strong, 605 A.2d 510 (1992) 10

State v. Higa, 897 P.2d 928 (Hawaii 1995) 10

State v. Savard, 659 A.2d 1265, 1268 (Me. 1995) 10

State v. Cassady, 662 A.2d 955 (N.H. 1995) 10

State v. Mayo, 1996 Mo. LEXIS 15 10

State v. Talavera, 905 P.2d 633 (Ida. 1995) 10

Luk v. Commonwealth, 421 Mass. 415,
658 N.E.2d 664 (Mass. 1995) 10

State v. Zimmerman, 539 N.W.2d 49 (N.D. 1995) 10

State v. Becker, 669 A.2d 548 (Vt. 1995) 10

State v. Baca, 904 P.2d 1044 (N.M. 1995) 10

State v. Jones, 340 Md 235, 666 A.2d 128 (1995) 10

STATUTES:

Connecticut General Statutes §14-230a 3
Connecticut General Statutes §14-227a . . . . . v, 2, 3
Connecticut General Statutes §14-227b 2-4

CONSTITUTIONAL PROVISIONS:

Fifth Amendment of the
United States Constitution . . . . . v, 2, 5,8, 14

MISCELLANEOUS:

21 U.S.C. §§ 881(a)(4) and (a)(7) 6

IN THE SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1995

WENDY R. HICKAM, PETITIONER

v.

STATE OF CONNECTICUT, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CONNECTICUT

Petitioner, Wendy R. Hickam, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Connecticut entered on December 26, 1995 in *State v. Wendy R. Hickam*, 235 Conn. 614. That judgment reversed the decision of the Superior Court for the State of Connecticut granting petitioner's Motion to Dismiss the criminal charge of operating while under the influence of intoxicating liquor in violation of Connecticut General Statutes §14-227a on the basis that petitioner's continued prosecution was in violation of her right under the Fifth Amendment of the United States Constitution not to be punished twice for the same offense.

OPINIONS BELOW

The Supreme Court of Connecticut has issued an opinion in this case, reported at 235 Conn. 614 (1995), a copy of which appears in Appendix A to this Petition, at page A-1. The prior opinion of the Superior Court of Connecticut issued in this case is reported at 13 Conn.L.Rptr. 18, 571 (1995) and appears in Appendix B to this Petition, at page B-1.

JURISDICTION

The judgment of the Supreme Court of Connecticut entered on December 26, 1995. No motion for rehearing was filed. The jurisdiction of this Court is invoked under 28 USCS §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person by subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Connecticut General Statutes §14-227a, set forth in Appendix C on page C-1.

3. Connecticut General Statutes §14-227b, set forth in Appendix D, at page D-1.

STATEMENT OF THE CASE

On December 16, 1994, petitioner was stopped by a police officer in Groton, Connecticut after observing petitioner commit one or more traffic violations. The officer noticed the odor of alcohol on her breath and after conducting field sobriety tests placed petitioner under arrest for the offense of operating under the influence of alcohol; Connecticut General Statutes §14-227a; and failure to drive upon the right; Connecticut General Statutes §14-230a. Petitioner then took two blood alcohol tests, the results of which were .182 and .161, in excess of the statutory standard for being under the influence of liquor of .10 set forth in Connecticut General Statutes §14-227a.

Petitioner's motor vehicle operator's license was suspended by administrative action of the Connecticut Department of Motor Vehicles for ninety days pursuant to Connecticut General Statutes §14-227b(h) for her blood alcohol level being in excess of .10. Petitioner then filed a Motion to Dismiss to the charge of operating under the influence in the criminal proceedings in the Superior Court on the ground that her Fifth Amendment right against double jeopardy would be violated by prosecution and punishment after imposition of the administrative sanction of license suspension.

Argument was heard on the Motion in the Superior Court for the Judicial District of New London, G.A. 10 before Judge Kevin McMahon on March 23, 1995. Briefs were filed by petitioner and the State of Connecticut on that date. On April 20, 1995, the Court heard additional argument, and, on the same date, the State filed a supplemental memorandum. Also on that date, the Court issued its memorandum of decision, granting petitioner's Motion to Dismiss. The Court agreed with petitioner that in accordance with the United States Supreme Court cases of *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989); *Austin v. United States*, 509 U.S.

____, 113 S.Ct. 2801 (1993) and *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. ___, 114 S.Ct. 1937 (1994), the inquiry for double jeopardy analysis is whether a civil sanction is solely remedial and not retributive or punitive. The Court found that Connecticut General Statutes §14-227b authorizing administrative suspension upon arrest for driving under the influence of liquor was enacted in large part with the intent to punish and deter, and had the effect of punishment and was not a solely remedial sanction.

The State of Connecticut sought and was granted permission to appeal the dismissal of the charge. On December 26, 1995, the Supreme Court of the State of Connecticut issued its decision reversing the judgment of dismissal. The Court held that the correct inquiry for double jeopardy analysis was not whether the sanction at issue must be found "solely remedial" to not constitute punishment but rather, whether, to be punishment, the sanction can be characterized "only as deterrent or retribution" without any remedial purpose.

REASONS FOR GRANTING THE PETITION

In this case, the Connecticut Supreme Court has decided a federal question, whether an administrative sanction constitutes punishment for the purposes of double jeopardy analysis, which conflicts with the decisions of the United States Supreme Court of *Halper*, *Austin* and *Kurth Ranch*. The specific circumstance in which the analysis arises, the administrative suspension of a motor vehicle operator's license for operating while under the influence and criminal prosecution for the same conduct, in separate proceedings, is national in scope and has been raised in both state and federal courts.

The central issue in this case and in decisions by the courts of last resort in other states, in United States District

Courts and United States Courts of Appeals is the effect to be given to the following language in *Halper*:

> From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. (Citation omitted) We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

Halper, at 448, 449.

The trial court, in granting petitioner's motion to dismiss applied the standard set forth in the first sentence; found that the sanction of administrative license suspension was not solely remedial but also served deterrent and retributive purposes and was thus punishment. In reversing the trial court's decision, the Connecticut Supreme Court found, that "[T]his language, however, is mere dicta and is inconsistent with *Halper's* explicit holding." *State v. Hickam* at 620. The Court stated that the explicit holding of *Halper* is set forth in the second sentence and requires that for a sanction to constitute punishment for double jeopardy analysis it "may not be fairly characterized as remedial, but *only* as a deterrent or retribution (Emphasis added)." *State v. Hickam* at 621.

In so ruling, the Connecticut Supreme Court chose to ignore, as surplusage, the explicit guidance of the United States Supreme Court in *Halper* for evaluating sanctions that may offend the Double Jeopardy Clause of the Fifth Amendment.

The Court, further, dismisses in a footnote, the decision in *Austin* which emphasized that the United States Supreme Court meant precisely what it said in *Halper*, that a sanction that cannot be characterized as serving a solely remedial purpose but also serves the purposes of retribution or deterrence is punishment.

In *Austin*, the Court focussed on the issue of whether forfeiture of property under 21 U.S.C. §§ 881(a)(4) and (a)(7) is punishment.

> In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish. We said in Halper that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 490 US, at 448, 104 L.Ed.2d 487, 109 S.Ct 1892. We turn, then to consider whether, at the time the Eighth Amendment was ratified, the forfeiture was understood at least in part as punishment and whether forfeiture under §§ 881(a)(4) and (a)(7) should be so understood today.
>
> *Austin*, 125 L.Ed.2d at 498.

After an exhaustive review of the nature of the sanction of forfeiture the Court stated:

> In sum, even though this Court has rejected the "innocence" of the owner as a common law defense to forfeiture, it consistently has recognized that forfeiture serves, at least in part, to punish the owner. (emphasis added).
>
> -
>
> We conclude therefore, that forfeiture in general and statutory in rem forfeiture in particular historically have been understood, at least in part, as punishment. [12] (emphasis added).

Austin, Id. at 503.

The Court then makes clear in footnote 12 that the standard applied by the trial court in this case, and not the standard advanced by the Connecticut Supreme Court, was the proper test to determine if a civil sanction is punishment.

> The doubts that Justice Scalia, see post, at ___ _ ___, 125 L. Ed. 2d, at 507-508, and Justice Kennedy, see post, at ___ _ ___, 125 L Ed 2d, at 510, express with regard to the historical understanding of forfeiture as punishment appear to stem from a misunderstanding of the relevant question. Under United States v. Halper, 490 US 435, 448, 104 L Ed 2d 487, 109 S Ct 1892 (1989), the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion.

Austin, Id. at 503, footnote 12.

Despite this reiteration in *Austin* by the United States Supreme Court of the *Halper* test, that a sanction which is

punitive in part and not solely remedial is punishment, the Connecticut Supreme Court has chosen to disregard this test. In a footnote, the Court states that petitioner's reliance on *Austin* is misplaced, distinguishing *Austin* as an Eighth Amendment Excessive Fines Clause case inapplicable to Fifth Amendment Double Jeopardy determinations. *State v. Hickam* at 620, footnote 7.

The United States Supreme Court however made no distinction in *Austin* between the Fifth Amendment Double Jeopardy Clause and the Eighth Amendment Excessive Fines Clause to decide the issue of whether a particular sanction constitutes punishment. The making of such a distinction in this case is based not in logic but on the Court's preference for what it terms "*Halper's* explicit holding." *State v. Hickam* at 620.

The Court also based its disregard of the test set forth in *Halper* and *Austin* by noting that in *Kurth Ranch* ". . . the court referred to the explicit holding of *Halper* . . ." *State v. Hickam* at 620 footnote 7. The Court misconstrues the significance of the holding in *Halper*. In *Kurth Ranch*, the United States Supreme Court does indeed refer to the holding of *Halper*:

> . . . we held that a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.
>
> *Kurth Ranch*, 1145 S.Ct. At 1945.

The Court in the next sentence however explains the significance of the holding:

> *Halper* thus decided that the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character.
>
> Id. at 1495.

Prior to *Halper*, the United States Supreme Court had never, in the context of Double Jeopardy analysis, decided that a sanction, ostensibly civil, was punitive and not remedial. (See Dissent of Rehnquist, *Kurth Ranch*, 1145 S.Ct. 1937).

The so-called "explicit holding" of *Halper* does not furnish a test for determining whether a sanction is punishment, it establishes the principle that labeling a sanction as civil does not foreclose analysis of whether it may be characterized as remedial or whether it is punishment. The test in *Halper* is set forth in the preceding sentence. *Kurth Ranch* does not deviate from this test when it states the question:

> Here, we ask only whether the tax has punitive characteristics that subject it to the constraints of the double jeopardy clause.
>
> *Kurth Ranch* at 1945.

If the so-called test of "the explicit holding" in *Halper* were to govern the inquiry, the question would be whether the tax has remedial characteristics that save it from the constraints of the Double Jeopardy Clause since the tax would not be punishment unless it could be characterized "only as a deterrent or retribution."

This was not the question asked and answered by the United States Supreme Court in *Halper*, *Austin* and *Kurth Ranch*, but it is the approach followed by the Connecticut Supreme Court in this case. It is also the approach followed by the highest court of every state that has reviewed the double

jeopardy implications of administrative license suspensions coupled with criminal prosecution of persons arrested for driving while under the influence.[1]

The Connecticut Supreme Court relied on the decisions of other state appellate courts for its interpretation of *Halper*:

> Accordingly, after a review of *Halper* and its interpretation by other jurisdictions, we conclude that *Halper* stands for the proposition that a civil or administrative sanction that serves a legitimate remedial purpose and is related rationally to that purpose does not give rise to a double jeopardy violation even if the sanction has some deterrent effect. Conversely, no matter what its label, a sanction or portion thereof that seeks only to punish triggers the protection of the double jeopardy clause.
>
> *State v. Hickam*, at 623.

It is apparent in this case and in the decisions of the highest courts of other states that heavy reliance is being placed on antecedent state appellate court decisions for the proposition that administrative license suspension is not punishment. A number of these decisions predate *Halper, Austin* and *Kurth Ranch*. None of the decisions, apply the "solely remedial" test

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1. See: *Butler v. Dept. Of Public Safety & Corr.*, 609 So.2d 790 (La. 1992); *State v. Strong*, 605 A.2d 510 (1992); *State v. Higa*, 897 P.2d 928 (Hawaii 1995); *State v. Savard*, 659 A.2d 1265, 1268 (Me. 1995); *State v. Cassady*, 662 A.2d 955 (N.H. 1995); *State v. Mayo*, 1996 Mo. LEXIS 15; *State v. Talavera*, 905 P.2d 633 (Ida. 1995); *Luk v. Commonwealth*, 421 Mass. 415, 658 N.E.2d 664 (Mass. 1995); *State v. Zimmerman*, 539 N.W.2d 49 (N.D. 1995); *State v. Becker*, 669 A.2d 548 (Vt. 1995); *State v. Baca*, 904 P.2d 1044 (N.M. 1995); *State v. Jones*, 340 Md 235, 666 A.2d 128 (1995).

of *Halper* in their analysis. If this case goes unexamined, it is reasonable to assume that state courts will continue to review and uphold administrative license suspension as a non-punitive sanction based on the erroneous test applied by the Connecticut Supreme Court.

The issue raised in this case, the appropriate analysis required by *Halper, Austin* and *Kurth Ranch* and its specific application in reviewing administrative license suspension is not confined to state courts. The issue has been raised in federal district courts in the prosecution of United States Army personnel for driving under the influence of alcohol after administrative suspension of driving privileges on a military reservation, for the same conduct. In *United States of America v. Kenneth Johnson*, 767 F.Supp. 389, the United States District Court for the Eastern District of Virginia, granted defendant's motion to dismiss the criminal charge. Discussing *Halper*, the Court found that:

> . . . the Supreme Court fashioned the following test for determining whether a civil sanction constitutes punishment for double jeopardy purposes: [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes is punishment as we have come to understand the term.
>
> Id. At 7.

After reviewing Army Regulation 190-5, which provided for the administrative suspension, the court found that its purpose was not solely remedial and dismissed the charge of driving under the influence. Conversely, in a case involving the same issues and Army regulation, the United States District Court for the Northern District of Alabama in *United States of America v. Donnie Virgil*, Case No. CR-95-TMP-225-E

(unpublished), denied defendant's motion to dismiss, finding the regulation to be remedial in nature. Significantly, the court based its decision on other language of *Halper*:

> The test stated by the Supreme Court in *Halper* is as follows:
>
> > To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the goals the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.
> >
> > These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence.
>
> Id at 6.

Clearly, there is no unanimity either between our state and federal courts or among our federal courts in interpreting *Halper, Austin* and *Kurth Ranch* in cases involving separate administrative and criminal sanctions for driving under the influence. In the larger context of evaluating civil sanctions in general, the monolithic approach of state courts in refusing to recognize the true test of *Halper* and its progeny stands in sharp contrast with federal courts that recognize the test, apply it, and should provide guidance to state courts on this issue of federal law.

The United States Court of Appeals for the Sixth Circuit in *United States of America v. Guy Jerome Ursery*, 59 F.3d, 568 (6th Cir. 1995), decided July 13, 1995, months before the

decision in this case and other state cases, quoted *Halper* with special emphasis on the proper test:

> . . .From these premises, it follows that *a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.* We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that a second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.
>
> Id. at 573.

The court found on the basis of *Austin* that civil forfeiture of property did not serve solely a remedial purpose and was thus punishment for double jeopardy purposes. Despite the weight of authority accorded to decisions of a United States Circuit Court of Appeals in matters of federal law state courts continue to interpret *Halper* otherwise.

Remarkably, in this case, the Connecticut Supreme Court, cited an earlier United States Circuit Court of Appeals decision, from the Tenth Circuit, in support of its preference for the "explicit holding" of *Halper*, (*State v. Hickam* at 621) but in fact the opinion held quite the opposite:

> Furthermore, Appellants' proposition that a sanction should be considered punishment if it is not solely remedial is supported by common sense. That is to say, if a particular remedial sanction can only be understood as also serving

> punitive goals, then the person subjected to the sanction has been punished despite the fact that the sanction is also remedial. To conclude otherwise effectly invalidates the Double Jeopardy Clause by allowing multiple punishments for the same conduct merely because the punishment also serves remedial purposes. We therefore must conclude that if a sanction is not exclusively remedial, but rather can only be explained as also affecting deterrence or retribution, it is punishment for double jeopardy analysis.
>
> *United States v. Hudson*, 14 F.3d 536 (10th Cir. 1994)

The test adopted by the Connecticut Supreme Court to determine when a civil sanction constitutes punishment conflicts with the decisions of the United States Supreme Court in *Halper, Austin* and *Kurth Ranch,* with decisions of the United States Courts of Appeals and, as *United States v. Hudson* demonstrates, defies common sense. The protection afforded by the Double Jeopardy Clause of the Fifth Amendment should not depend on whether it is raised in a state or federal court. It is imperative that this conflict in interpretation be resolved for the protection of citizens in our state courts.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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No. _____

In The

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October Term, 1995

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v.

STATE OF CONNECTICUT,

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ON PETITION FOR WRIT OF CERTIORARI
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OF THE STATE OF CONNECTICUT

APPENDIX

APPENDIX A

DECISION AND OPINION OF THE
CONNECTICUT SUPREME COURT

STATE OF CONNECTICUT V. WENDY HICKAM
(235 Conn. 614; 668 A.2d 1321)

(Argued: 9/19/95 Decided: 12/26/95)

PRIOR HISTORY:

Information charging the defendant with operating a motor vehicle while under the influence of intoxicating liquor and failing to drive on the right, brought to the Superior Court in the judicial district of New London, geographical area number ten, where the court, McMahon, J., granted the defendant's motion to dismiss the charge of operating under the influence of intoxicating liquor and rendered judgment thereon, from which the state, on the granting of permission, appealed.

DISPOSITION: Reversed; further proceedings.

COUNSEL: Carolyn K. Longstreth, assistant state's attorney, with whom, on the brief, were Kevin Kane, state's attorney, and Paul Narducci, deputy assistant state's attorney, for the appellant (state).

Edward E. Moukawsher, for the appellee (defendant).

Richard Blumenthal, attorney general, Aaron S. Bayer, deputy attorney general, and Gregory T. D'Auria, assistant attorney general, filed a brief for the attorney general as amicus curiae.

JUDGES: Peters, C. J., and Callahan, Borden, Berdon, Norcott, Katz and Palmer, Js. In this opinion PETERS, C. J., and BORDEN, NORCOTT, KATZ and PALMER, Js., concurred. BERDON, J., dissenting.

OPINION BY: CALLAHAN

OPINION: CALLAHAN, J. The sole issue in this appeal taken by the state[1] is whether the double jeopardy clause of the fifth amendment to the United States constitution prohibited the criminal prosecution of the defendant, Wendy R. Hickam, for operating a motor vehicle while under the influence of intoxicating liquor in violation of General Statutes §14-227a (a),[2] after her motor vehicle operator's license had been suspended pursuant to General Statutes §14-227b[3] for the same

---

1. The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book §4023 and General Statutes §51-199 (c). [*3]

2. General Statutes §14-227a provides in relevant part: "Operation while under the influence of liquor or drug or while impaired by liquor. (a) Operation while under the influence. No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if he operates a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been established in accordance with the provisions of section 14-218a, or in any parking area for ten or more cars or on any school property (1) while under the influence of intoxicating liquor or any drug or both or (2) while the ratio of alcohol in the blood of such person is ten-hundredths of one per cent or more of alcohol, by weight."

3. General Statutes §14-227b provides in relevant part: "Implied consent to test. Suspension of license for refusing to submit to test or having elevated blood alcohol content. Hearing. (a) Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical analysis of his blood, breath or urine . . . .

"(c) If the person arrested refuses to submit to such test or analysis or submits to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicate that the ratio of alcohol in the blood of such person is ten-hundredths of one per cent or more of alcohol, by weight, the police officer, acting on behalf of the commissioner of motor vehicles, shall immediately revoke and take possession of the motor vehicle operator's license or, if such person is a nonresident, suspend the nonresident operating privilege of such person, for a twenty-four-hour period and shall issue a temporary operator's license or nonresident operating privilege to such person valid for the period commencing twenty-four hours after issuance and ending thirty days after the date such person received notice of his arrest by the police officer. The police officer shall prepare a written report of the incident and shall mail the report together with a copy of the completed temporary license form, any operator's license taken into possession and a copy of the results of any chemical test or analysis to the department of motor vehicles within three business days. The report shall be made on a form approved by the commissioner of motor vehicles and shall be subscribed and sworn to under penalty of false statement as provided in section 53a-157b by the arresting officer. If the person arrested refused to submit to such test or analysis, the report shall be endorsed by a third person who witnessed such refusal. The report shall set forth the grounds for the officer's belief that there was probable cause to arrest such person for manslaughter in the second degree with a motor vehicle or assault in the second degree with a motor vehicle or for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both or while his ability to operate such motor vehicle is impaired by the consumption of intoxicating liquor, and shall state that such person had refused to submit to such test or analysis when requested by such police officer to do so or that such person submitted to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that the ratio of alcohol in the blood of such person was ten-hundredths of one per cent or more of alcohol, by weight.

"(d) Upon receipt of such report, the commissioner of motor vehicles shall suspend any license or nonresident operating privilege of such person effective as of a date certain, which date shall be not later than thirty days after the date such person received notice of his arrest by the police officer. Any person whose license or operating privilege has been suspended in accordance with this subsection shall automatically be entitled to a hearing before the commissioner to be held prior to the effective date of the suspension. The commissioner shall send a suspension notice to such person informing such person that his operator's license or nonresident operating privilege is suspended as of a date certain and that he is entitled to a hearing prior to the effective date of the suspension and may schedule such hearing

conduct. The state appealed from the judgment of the trial court dismissing the criminal charges against the defendant on double jeopardy grounds. The trial court concluded that the administrative suspension of the defendant's license pursuant to §14-227b embodied an element of punishment that barred a subsequent criminal prosecution pursuant to §14-227a as violative of the double jeopardy clause of the fifth amendment to the United States constitution.[4] We reverse the judgment of the trial court.

The relevant facts are undisputed. On December 16, 1994, the defendant was arrested for operating a motor vehicle while under the influence of intoxicating liquor in violation of §14-227a (a).[5] Following the defendant's arrest, the commissioner of motor vehicles suspended her motor vehicle operator's license for a period of ninety days pursuant to General Statutes §14-227b (h) (1) (A).[6] Prior to the defendant's trial for allegedly operating a motor vehicle while under the influence in violation of §14-227a (a), she moved to dismiss that charge, claiming that the ninety day suspension of her license was punishment and that any further prosecution or punishment was precluded by the double jeopardy

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by contacting the department of motor vehicles not later than seven days after the date of mailing of such suspension notice." [*4]

4. The fifth amendment to the United States constitution is made applicable to the states by the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 793-96, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

5. The defendant was also arrested for failure to drive on the right in violation of General Statutes §14-230 (a).

6. General Statutes §14-227b (h) provides in relevant part: "The commissioner shall suspend the operator's license . . . and revoke the temporary operator's license . . . for a period of: (1) (A) Ninety days, if such person submitted to a test or analysis and the results of such test or analysis indicated that the ratio of alcohol in the blood of such person was ten-hundredths of one per cent or more of alcohol, by weight . . . ."

clause of the fifth amendment. The trial court granted the defendant's motion, concluding that the government imposed suspension had a deterrent purpose or effect and constituted punishment that barred any criminal prosecution for the same offense as violative of the double jeopardy clause. This appeal followed.

The double jeopardy clause of the fifth amendment to the United States constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ." The double jeopardy clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The third of these protections is at issue in the present case. We must determine, therefore, whether the administrative suspension of the defendant's operator's license constitutes punishment that presents an impediment to her prosecution pursuant to §14-227a (a).

The defendant relies principally on *United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), to support her claim that the trial court correctly concluded that the suspension of her motor vehicle operator's license barred further prosecution or punishment for her alleged violation of §14-227a (a). In *Halper*, the defendant was convicted of sixty-five separate violations of the federal criminal false claims statute, 18 U.S.C. §287. Each violation involved a billing to Medicare for $12 for reimbursement for medical services worth only $3. The actual damage to the government as a result of the defendant's scheme was $585. Upon his conviction of the criminal violations, the defendant was sentenced to two years imprisonment and fined $5000. Subsequently, the government filed a separate civil action against the defendant in an attempt to recover a $2000 penalty for each violation as authorized by the applicable statute. Thus, the government sought to collect $130,000 from the defendant. The United States District Court refused to impose most of the

additional penalties against the defendant, concluding that the requested amounts bore no rational relationship to the government's losses or costs, and that the assessment of the full amount would be an additional punishment that would violate the double jeopardy clause by punishing Halper a second time for the same offense. *United States v. Halper*, supra, 439. The government appealed directly to the United States Supreme Court pursuant to 28 U.S.C. §1252. The narrow issue presented to the court was whether the attempted imposition of the civil fines against Halper by the government, following his criminal prosecution and punishment for the same underlying misconduct, violated the double jeopardy clause. Id., 447-50.

The court determined that the imposition of the full amount of the sought after monetary penalties would constitute punishment. It explicitly held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution." (Emphasis added.) Id., 448-49. The court recognized the difficulty in conducting this inquiry and indicated that a violation of the double jeopardy clause "can be identified only by assessing the character of the actual sanction imposed on the individual by the machinery of the state." Id., 447.

In holding that the civil penalty authorized by the statute was so disproportionate to the offense as to have violated the constitutional prohibition against multiple punishments, the court announced that this is "a rule for the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." Id., 449. The court then remanded the case to the trial court in order to allow the government an opportunity to demonstrate its losses and costs because it had not previously challenged the assessment of damages. The

government rather had chosen to litigate only the comprehensive double jeopardy issue that the Supreme Court decided. Id.

The defendant claims that *Halper* states and stands for the proposition that a civil sanction is punishment unless it can "fairly be said *solely* to serve a remedial purpose . . . ."[7] (Emphasis added.) Id., 448. This language, however, is mere dicta and is inconsistent with *Halper's* explicit holding. It was, nevertheless, the language upon which the trial court focused in concluding that the suspension of the defendant's operator's license was

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7. The defendant also relies on Austin v. United States, 509 U.S. , 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993), to support her claim that a sanction must be solely remedial for it to avoid being denominated punishment for purposes of the double jeopardy clause. In Austin, the court held that the civil forfeiture of a defendant's property following his conviction and sentencing on drug charges constituted punishment and, therefore, was prohibited by the excessive fines clause of the eighth amendment. Id., 2812. The court reasoned that because the civil forfeiture did not serve solely a remedial purpose, it was subject to the limitations of the eighth amendment. Id.

The defendant's reliance on Austin, however, is misplaced. First, Austin did not deal with whether the forfeiture constituted a multiple punishment for purposes of the double jeopardy clause, but focused instead on whether the forfeiture was excessive for purposes of the excessive fines clause. Id. Second, the court exhaustively analyzed the historical underpinnings of civil forfeiture, and determined that the traditional view of civil forfeiture as punishment combined with an obvious deterrent and retributive legislative intent, led to the conclusion that the forfeiture at issue could only be properly characterized as punishment. Id. Third, in a more recent case involving a double jeopardy analysis of whether a tax could properly be characterized as punishment; Dept. of Revenue of Montana v. Kurth Ranch, 511 U.S. , 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994); the court referred to the explicit holding of Halper and held that the tax statute was fairly characterized as punishment. Id., 1946. The court accepted that the tax served to deter, but noted that such deterrence does not in and of itself automatically cause a tax to be characterized as a punishment. Id., 1946-47. The court focused on various punitive factors of the tax that outweighed, under the particular circumstances of that case, any remedial purpose. Id., 1948.

punishment that raised a double jeopardy bar. If the above quoted dicta from *Halper* were adhered to literally and in isolation as the proper standard by which to evaluate an administrative sanction, any such sanction that exhibited even a minuscule deterrent or retributive purpose would have to be denominated punishment for double jeopardy purposes.

As quoted earlier, the explicit holding of *United States v. Halper*, supra, 448-49, is: "We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution." (Emphasis added.) We cannot reconcile *Halper*'s explicit holding with the language relied upon by the trial court and the defendant in this case. The majority of courts that have addressed the issue of whether the imposition of a civil sanction constitutes punishment for purposes of the double jeopardy clause, however, have applied *Halper's* explicit holding, and have rejected the notion that *Halper* intended to characterize as punishment all civil or administrative sanctions that have any deterrent effect. See, e.g., *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. , 114 S. Ct. 1937, 1946-47, 128 L. Ed. 2d 767 (1994); *Garrity v. Fiedler*, 850 F. Sup. 777, 778-79 (E.D. Wis. 1994); *State v. Funke*, 531 N.W.2d 124, 126-27 (Iowa 1995); *State v. Savard*, 659 A.2d 1265, 1268 (Me. 1995); *State v. Strong*, 158 Vt. 56, 61-62, 605 A.2d 510 (1992). The majority of courts have also concluded that administrative sanctions that have the remedial purpose of advancing public safety interests do not constitute punishment for purposes of double jeopardy analysis. See, e.g., *United States v. Hudson*, 14 F.3d 536, 542 (10th Cir. 1994) (administrative order barring defendants from future banking activities not bar to subsequent prosecution for related criminal offense); *United States v. Furlett*, 974 F.2d 839, 844-45 (7th Cir. 1992) (administrative ban on commodities trading not bar to subsequent criminal prosecution for same underlying misconduct); *Schillerstrom v. State*, 180 Ariz. 468, 470-71, 885

P.2d 156 (1994) (criminal prosecution not bar to subsequent administrative revocation of chiropractic license even though based on same behavior giving rise to prosecution); *Loui v. Board of Medical Examiners*, 78 Haw. 21, 25-29, 889 P.2d 705 (1995) (one year suspension from practice of medicine by board of medical examiners following criminal prosecution based on same conduct not barred by double jeopardy prohibition against multiple punishments).

Finally, most courts that have spoken directly to the issue of whether an administrative license suspension following an arrest for driving while intoxicated raises a double jeopardy bar to prosecution have consistently relied upon *Halper's* explicit holding and have determined that if a license suspension furthers the legitimate remedial goal of public safety, it is not punishment in the double jeopardy context even if it has an incidental deterrent or retributive effect. See *Baldwin v. Dept. of Motor Vehicles*, 35 Cal. App. 4th 1630, 42 Cal. Rptr. 2d 422, 427-30 (1995) (administrative license suspension based on drunk driving arrest may not be fairly characterized as deterrent or punitive measure and does not bar further prosecution or punishment); *State v. Murray*, 644 So. 2d 533, 535 (Fla. App. 1994) (administrative license suspension does not prohibit subsequent criminal prosecution because primary purpose of suspension is public safety as opposed to punishing offender); *State v. Higa*, 79 Haw. 1, 897 P.2d 928, 932-34 (1995) (license suspension is remedial in that it protects public by removing potentially dangerous drivers from state roadways and does not bar subsequent criminal prosecution); *State v. Funke*, supra, 531 N.W.2d 126-27 (license suspension that principally serves remedial purpose does not implicate double jeopardy protection against multiple punishments and therefore does not bar subsequent criminal prosecution); *Butler v. Dept. of Public Safety & Corrections*, 609 So. 2d 790, 797 (La. 1992) (license suspension bears rational relationship to legitimate governmental purpose of promoting public safety and does not serve as bar to subsequent criminal prosecution); *State v. Savard*, supra, 659 A.2d 1268 (license suspension serves as

means to ensure public safety and subsequent criminal prosecution based on same conduct is not prohibited by double jeopardy clause); *State v. Jones*, 340 Md. 235, 666 A.2d 128 (1995) (administrative license suspension following drunk driving arrest serves remedial purpose and therefore not bar to criminal prosecution); *State v. Hanson*, 532 N.W.2d 598, 601-602 (Minn. App. 1995) (ninety day revocation of driver's license fairly characterized as remedial and therefore does not prohibit criminal prosecution); *State v. Cassady*, N.H. , 662 A.2d 955, 959 (1995) (administrative license suspension following drunk driving arrest does not bar subsequent prosecution because it is not so punitive as to constitute punishment in violation of double jeopardy clause); *Tench v. Commonwealth*, 21 Va. App. 200, 462 S.E.2d 922 (1995) (license suspension following drunk driving arrest serves remedial purpose and therefore double jeopardy not bar to subsequent criminal prosecution).

Accordingly, after a review of *Halper* and its interpretation by other jurisdictions, we conclude that *Halper* stands for the proposition that a civil or administrative sanction that serves a legitimate remedial purpose and is related rationally to that purpose does not give rise to a double jeopardy violation even if the sanction has some deterrent effect. Conversely, no matter what its label, a sanction or portion thereof that seeks only to punish triggers the protection of the double jeopardy clause.

Having determined that the explicit holding of *Halper*, rather than the test utilized by the trial court, enunciates the proper standard by which to measure a civil or administrative sanction for purposes of the double jeopardy clause, we must determine whether Connecticut's statute mandating an administrative license suspension under defined circumstances, following an arrest for driving while under the influence, is fairly characterized as remedial. We conclude that the statute is sufficiently remedial so that the administrative suspension does not bar a future prosecution for the same conduct that gave rise to the suspension.

In determining whether a suspension pursuant to §14-227b is punishment or is remedial for double jeopardy purposes, we need to assess the nature of the administrative sanction imposed upon the individual and the purposes that it serves. *United States v. Halper*, supra, 490 U.S. 448. We note at the outset that the question of whether a sanction constitutes punishment is not to be answered from the perspective of the person affected because not infrequently "remedial sanctions carry the sting of punishment." Id., 447 n.7. Consequently, one against whom any administrative action has been taken might well be of the opinion that he or she was indeed being "punished." Additionally, the label that the legislature attaches to the sanction does not control our double jeopardy inquiry because "it is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." Id., 447.

An examination of the legislative history of §14-227b reveals that a principal purpose for the enactment of the statute was to protect the public by removing potentially dangerous drivers from the state's roadways with all dispatch compatible with due process. Legislators expressed the hope that "this bill [would] save lives . . . [because] anywhere from 20-30 people, Connecticut residents [would] be spared . . . ." 32 H.R. Proc., Pt. 30, 1989 Sess., p. 10,562, remarks of Representative Christopher Burnham. Legislators also hoped that the bill would send a "message that we will not tolerate drunken drivers on our roads . . . [and] the loss of life and property on our roads as a result of drunken drivers." 32 S. Proc., Pt. 12, 1989 Sess., p. 3979, remarks of Senator Anthony V. Avallone. Other legislators noted that there was a "need to do . . . something stronger than we have done by strictly our criminal laws, something that will use the administrative process in a prompt and sure fashion to make sure that those who drive and drink, don't do so for very long." Id., p. 3985, remarks of Senator Richard Blumenthal. "This bill goes a long way toward restoring . . . the safety that we all expect and

deserve in traveling on our roads." Id., p. 3986, remarks of Senator James H. Maloney.

We acknowledge that the legislative history of §14-227b contains evidence that the ninety day suspension of an operator's license was intended to some extent to furnish a deterrent to driving while under the influence of intoxicating liquor. We note, however, that a deterrent purpose does not automatically mark an administrative action as punitive for double jeopardy purposes. *Dept. of Revenue of Montana v. Kurth Ranch*, supra, 114 S. Ct. 1946. Indeed, it is difficult to envision any administrative sanction that does not have some incidental deterrent effect. Accordingly, although various legislators, to some degree, envisioned that the ninety day suspension would deter individuals from driving while intoxicated, a determination that the suspension period primarily serves a remedial purpose is not foreclosed. The legislation's deterrent effect must be considered in conjunction with the equally important public safety purpose that §14-227b was obviously enacted to serve. On balance, we conclude that any deterrent purpose manifested by the legislative history of §14-227b is incidental to its overall remedial purpose of removing from the highways those who have exhibited a propensity to drive while under the influence of alcohol.

We conclude that the principal thrust of §14-227b is to protect the public by temporarily revoking, prior to conviction, the operating privileges of those who have demonstrated a reckless disregard for the safety of others, while at the same time providing procedures to afford due process to those that come within its ambit. While any remedial statute or regulation likely embodies a certain element of deterrence, the remedial purpose of §14-227b outweighs its incidental deterrent effect. We conclude further that the ninety day suspension period mandated by §14-227b is not disproportionate to the public safety interest that is served by the expeditious suspension of the operating privileges of an individual who has been administratively found to have operated a motor vehicle with a blood alcohol content of 0.10 of

1 percent or more. An administrative suspension of operating privileges pursuant to §14-227b is rationally related to the legislature's assessment that public safety on our highways is furthered by the prompt removal from behind the wheel, even if only temporarily, of those individuals who have been arrested for operating under the influence. Succinctly put, the ninety day suspension period is not "so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *United States v. Halper*, supra, 490 U.S. 443.

The fact that the operating privileges of a driver arrested for operating a motor vehicle while under the influence are allowed to be retained temporarily for a thirty day period does not affect our determination that §14-227b is remedial. An operator's license is a privilege that the state may not revoke without furnishing the holder of the license due process as required by the fourteenth amendment. *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).[8] Consequently, the legislature has simply provided to a driver who has been arrested the opportunity to contest the loss of his or her license, while retaining operating privileges until a final determination on an extended suspension can be made after a hearing. The short period of retention of driving privileges pending a healing was obviously intended to eliminate any possible due process concerns and does not defeat the statute's remedial purpose of expeditiously removing potentially dangerous drivers from the road for a period of time. *State v. Hanson*, supra, 532 N.W.2d 602; see also *State v. Stevens*, 224 Conn. 730, 739, 620 A.2d 789 (1993) (Connecticut's statutory scheme reflects "an unambiguous policy

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8. Contrary to the assertion of the dissent, we do not claim that Bell v. Burson, supra, 402 U.S. 535, requires a hearing prior to the suspension of an operator's license. As the dissent notes, the state may satisfy due process concerns by providing a hearing either before or after depriving one of the property interest. In this instance, the legislature has chosen to provide a hearing prior to the suspension.

aimed at ensuring that our highways are safe from the carnage associated with drunken drivers").

Moreover, the legislature's decision to limit to only ninety days the suspension of a driver whose blood alcohol content tested to be 0.10 of 1 percent or more does not vitiate the statute's remedial purpose. While the legislature might have opted for a substantially longer suspension period, we cannot say that its decision not to do so is unreasonable or not rationally related to concerns of public safety, a remedial purpose. "We must defer to the Legislature in determining the remedial action necessary to achieve its goals. See [*United States v. Ward*, 448 U.S. 242, 249, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980)]." *State v. Strong*, supra, 158 Vt. 61; see *Quinnett v. Newman*, 213 Conn. 343, 347, 568 A.2d 786 (1990).[9]

In sum, we conclude that the administrative suspension of the defendant's operator's license had a legitimate remedial purpose and does not bar her criminal prosecution for allegedly violating §14-227a (a).

The judgment is reversed and the case is remanded to the trial court for further proceedings consistent with this opinion.

In this opinion PETERS, C. J., and BORDEN, NORCOTT, KATZ and PALMER, Js., concurred.

DISSENT BY: BERDON

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9. Additionally, we note the suspension period increases for subsequent violations of §14-227b, indicating that the legislature was determined to remove from the roadways for longer periods of time those who repeatedly have exhibited a propensity to drive while under the influence. For example, for a second violation, the offender loses his or her operator's license for a period of one year, and for three or more violations, the suspension period increases to two years. General Statutes §14-227b (h).

DISSENT: BERDON, J., dissenting. The majority's reversal of the trial court's dismissal of the charges of operating under the influence of intoxicating liquor in violation of General Statutes §14-227a (a) subjects the defendant, Wendy Hickam, to double jeopardy. Although deterring persons from operating motor vehicles while under the influence of alcoholic beverages is a laudable objective, it cannot be done through multiple punishments that transgress the double jeopardy clause of the United States constitution. In order to accomplish the underlying commendable purpose of decreasing the incidence of driving while under the influence, the legislature surely can fashion a statutory scheme that does not offend the constitution.

In this case, the issue presented is whether the two sanctions imposed pursuant to General Statutes §14-227b after the defendant's arrest for operating a vehicle under the influence of intoxicating liquor or drugs -- that is, (1) the suspension of her motor vehicle operator's license for twenty-four hours following her arrest and (2) the subsequent suspension of her license for a ninety day period -- constitute punishments for purposes of the double jeopardy clause. If either suspension constitutes "punishment," the criminal prosecution of the defendant arising out of the same incident must be dismissed because it would place the defendant in double jeopardy in violation of the fifth amendment. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

The United States Supreme Court has clearly held that a civil sanction may constitute a punishment for purposes of the double jeopardy clause. *United States v. Halper*, 490 U.S. 435, 447-48, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." Id. Thus, the essence and

character of a sanction must be examined to determine whether a civil sanction is truly punitive in nature.

Unfortunately, the Supreme Court of the United States has not provided a clear standard to determine whether a civil sanction is a punishment for purposes of the clause. *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. , 114 S. Ct. 1937, 128 L. Ed. 2d 767 (1994); *Austin v. United States*, 509 U.S. , 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993); *United States v. Halper*, supra, 490 U.S. 435. In 1989, the court in *Halper* held "that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. [The court therefore held] that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but *only* as a deterrent or retribution." (Emphasis added.) *United States v. Halper*, supra, 448-49. Four years later, the United States Supreme Court in *Austin*, while referring to the above quoted language from *Halper*, made it clear that a sanction is punishment if the sanction "serves *in part* to punish (Emphasis in original.) *Austin v. United States*, supra, 2810 n.12. The court further stated that "one need not exclude the *possibility* that [the sanction] serves other purposes to reach [the conclusion that the sanction is a punishment]."[1] (Emphasis added.) Id. Therefore, under Austin, a sanction with a punitive component is to be considered "punishment" for double

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1. Footnote 7 of the majority opinion provides that Austin is not to be utilized in reviewing this case because Austin involves a civil forfeiture. Unlike the majority, I have no reason to believe that "punishment" is defined differently under the fifth amendment's double jeopardy clause than it is under the eighth amendment's excessive fines clause. Indeed, *Kurth Ranch*, cites both *Austin* and *Halper* favorably when discussing when a civil sanction is to be deemed a "punishment" for triggering constitutional protection of the double jeopardy clause. *Dept. of Revenue of Montana v. Kurth Ranch*, supra, 114 S. Ct. 1945.

jeopardy analysis.[2] The following year, the Supreme Court of the United States *in Kurth Ranch again addressed the issue of when* a "civil" sanction, in the form of a tax on illegal drugs, may be constitutionally imposed. *Dept. of Revenue of Montana v. Kurth Ranch*, supra, 1937. At the commencement of its analysis the court stated: "Here, we ask only whether the tax has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause." Id., 1945. After reviewing several attributes of the tax in question, the court held that the tax was "fairly characterized as punishment . . . ." Id., 1948.

A careful analysis of *Halper*, *Austin* and *Kurth Ranch* leads to the conclusion that any sanction which is significantly punitive, although not necessarily predominantly punitive, must be classified as a "punishment." Id., 1945; *Austin v. United States*, supra, 113 S. Ct. 2812; *United States v. Halper*, supra, 490 U.S. 448-49. A sanction should be considered "significantly punitive," if, notwithstanding any remedial purpose, it is punitive in a meaningful way or if the intended purpose of the civil sanction is punitive.

The court today, purporting to follow *Halper*, sets forth a standard that is at odds with that decision.[3] The majority states

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2. Recently, the Tenth Circuit Court of Appeals, in *United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994), interpreted the language of *Halper* to mean that "if a particular remedial sanction can only be understood as also serving punitive goals, then the person subjected to the sanction has been punished despite that fact that the sanction is also remedial." The court went on to state: "To conclude otherwise effectively invalidates the Double Jeopardy Clause by allowing multiple punishments for the same conduct merely because the punishments also serve remedial purposes. We therefore must conclude that if a sanction is not exclusively remedial, but rather can only be explained as also affecting deterrence or retribution, it is punishment for double jeopardy analysis." Id.

3. The majority states that "we conclude that *Halper* stands for the proposition that a civil or administrative sanction that serves a legitimate remedial purpose and is related rationally to that purpose does not give rise

that any remedial effect, no matter how minuscule, will render a sanction remedial for double jeopardy purposes. Nevertheless, even if we should construe *Halper* in a manner that is most favorable to the state, the double jeopardy clause under those circumstances still requires that the sanction must be one that can "fairly be characterized as remedial" for it to pass constitutional muster. *United States v. Halper*, supra, 490 U.S. 448-49. Because the ninety day suspension cannot be "fairly characterized as remedial," this action must be dismissed.

In order to make a point, my analysis under the "fairly characterized as remedial" standard begins with the obvious. The twenty-four hour suspension imposed under §14-227b is purely remedial because it is "clearly focused on public safety." *State v. Washburn*, 34 Conn. App. 557, 564, 642 A.2d 70 (1994). Its manifest purpose is to protect others by prohibiting a person who has just been arrested for driving under the influence from operating a vehicle while he or she may still be intoxicated. Id.

The second sanction imposed under §14-227b -- that is, the ninety day suspension -- however, lacks such a remedial purpose. Upon arrest, an individual's operator's license is seized and a temporary license is issued. The temporary license is effective twenty-four hours after the arrest and remains valid for up to thirty days, thereby restoring the individual's right to operate a vehicle. The ninety day suspension does not commence until the person has a hearing to determine whether the police officer had probable cause to arrest and other related matters that would justify depriving him of the license. General Statutes §14-227b (f). Unless the individual waives his right to a hearing, the hearing must occur within thirty days of his arrest. General Statutes §14-227b (d).

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to a double jeopardy violation even if the sanction has some deterrent effect. Conversely, no matter what its label, a sanction or portion thereof that *seeks only to punish* triggers the protection of the double jeopardy clause." (Emphasis added.)

The majority claims that the remedial aspect of §14-227b is "to protect the public by removing potentially dangerous drivers from the state's roadways with all dispatch compatible with due process." If the ninety day suspension in §14-227b was truly remedial, the arrestee's right to operate a vehicle would not be restored for the thirty day period.[4] For example, a teacher accused of child abuse would not be allowed to continue teaching while awaiting a hearing, nor would an individual suspected of murder be issued a temporary gun permit. In such situations, the concern for the safety and welfare of others governs and the state's primary reason for taking such precautionary measures are thus remedial even though the individual is deprived of a property right.

If the ninety day suspension became effective when a person was arrested, then the suspension could arguably be characterized as remedial. Under those circumstances, we could logically conclude that the immediate suspension was necessary to remove from the highways persons who have a problem with alcohol or other drugs and to give those individuals an opportunity to seek professional aid and participate in appropriate driver's education programs. See, e.g., General Statutes §14-227a (k) (participation in alcohol education and treatment program). Instead, the statutory scheme of §14-227a puts the person, who has failed a blood alcohol test or refused to submit to one, behind a wheel twenty-four hours after his offense and allows him to continue driving for up to thirty days. This statutory scheme therefore precludes the ninety day suspension from being "fairly characterized as remedial." I agree with the defendant that there "is no correlation between safeguarding the public from an intoxicated driver and removing a person from the road well after his arrest for an arbitrary period. Clearly, the aim [of this statute] is deterrence, a classic goal of punishment."

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4. Indeed, if the suspension was remedial, the license would not be restored to the person automatically at the end of a fixed period. Rather, the license would be returned only after it was demonstrated that the person's alcohol related driving problem was resolved.

In fact, Representative John Tiffany posed the following hypothetical when §14-227b was being considered in the legislature: "What happens if a fellow is driving home on a Friday night. He's stopped and arrested, given one of these temporary licenses, and he's stopped again on Sunday, Sunday night or Monday prior to the time [the permanent suspension] can get through the mail[?]" 32 H.R. Proc., Pt. 30, 1989 Sess., pp. 10,529-30. In response, Representative Douglas Mintz stated that the individual would simply be prosecuted as a repeat offender. 32 H.R. Proc., Pt. 30, 1989 Sess., pp. 10,531-32. Representative Tiffany then sought to clarify Representative Mintz's response by stating: "In other words, if he were *stopped three times on his temporary license*, he would get a three time penalty at his first hearing." (Emphasis added.) 32 H.R. Proc., Pt. 30, 1989 Sess., p. 10,532. Again, this dialogue reflects the fact that the ninety day suspension was not principally intended to serve a remedial purpose.

The court excuses the illogic of designating the sanction, which commences thirty days after arrest, as remedial by declaring that such a period is necessary to protect the due process rights of a defendant in order to give him an opportunity to be heard before his license is suspended.[5] I am pleased that the court is concerned about the defendant's due process rights. This is especially so since a majority of the court, in *State v. Lopez*, 235 Conn. 487, A.2d (1995), recently held that a criminal defendant sentenced to an effective prison term of seventeen years did not have a right to a mere hearing before the trial court altered a transcript of the defendant's trial which removed the basis for an issue he raised on appeal. I can only conclude that, in any given case, an individual's due process right to be heard solely depends on which end of the

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5. The majority incorrectly cites *Bell v. Burson*, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), for the proposition that an operator's license cannot be suspended until there has been a hearing. Rather, *Bell* holds that due process is satisfied by providing a hearing *either before* or *after* a deprivation, depending on the circumstances of the case. Id., 542.

telescope -- the narrowing or the magnifying end -- the court that day decides to view the issue. Such capriciousness greatly concerns me.

Notwithstanding the court's laudable concern for due process in this case, the United States Supreme Court has consistently held that a flexible approach must be employed in determining what process is due an individual being deprived of a right. L. Tribe, American Constitutional Law (2d Ed. 1988) p. 718. Generally, an individual may not be deprived of his liberty or property until the individual has had the benefit of a hearing. Id., p. 719. In certain circumstances, however, a state may have a valid governmental interest, such as public safety, that necessitates the immediate deprivation of a right without a presuspension hearing, as long as the deprivation is followed by a subsequent hearing within a reasonable time. *Dixon v. Love*, 431 U.S. 105, 114, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977) (prompt removal of safety hazards is an important governmental interest); *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) (an individual may be deprived of a right without a prior hearing "where some valid governmental interest is at stake that justifies postponing the hearing until after the event"). Consequently, the majority's concern for due process to justify the thirty day period during which an individual's license is restored is misplaced.

In addition to the statutory scheme, the legislative history also clearly demonstrates that the intent of the legislature in enacting this statute was to punish drunk drivers in an expeditious fashion by utilizing administrative procedures. Although the majority acknowledges that the legislative history "to some extent" supports the plaintiff's position that §14-227b was enacted as a punitive measure, that characterization of the history by the court is misleading. In fact, the legislative history indicating that the primary intent in enacting this statute was to punish is overwhelming. One of the first comments made by Representative Richard Tulisano, chairperson of the judiciary

committee, regarding this bill was that "[i]t *penalizes* people stronger than anything we have seen here if *punishment* is the answer . . . ." (Emphasis added.) 32 H.R. Proc., Pt. 30, 1989 Sess., p. 10,518. Similar statements, too numerous to put in the body of this dissent, are found throughout the legislative history.[6]

The legislative history cited by the majority in support of its position is merely general statements from our legislators stating that the carnage caused by drunk driving is intolerable.

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6. The legislative history indicating that §14-227b is a punishment is as follows: "We have come together to develop a bill that has proven to be an *effective deterrent* to drunk driving . . . ." (Emphasis added.) 32 H.R. Proc., Pt. 30, 1989 Sess., p. 10,522, remarks of Representative Edith Prague. "[T]his amendment hopefully will act as *a deterrent* to have people realize the consequences of having that one drink too many, and thereby subjecting themselves to the loss of their license for 90 days . . . ." (Emphasis added.) Id., p. 10,523, remarks of Representative Douglas Mintz. "In the past in our law, under the alcohol education program, on a first arrest there was often no *penalty* beyond the fee to enter the program . . . . This, for the first time, puts in a suspension of the license of a first arrest, if that arrest is backed by either a refusal to take the test or a failure of the test . . . . There will be a *meaningful penalty* -- a 90 day loss of license." (Emphasis added.) Id., pp. 10,524-25, remarks of Representative Robert Ward. "[T]here are two important things the bill does. One . . . is a 90 day suspension on a first offense, but the second thing . . . is that by setting up an administrative process we can *act quickly* to get somebody's license away from them." (Emphasis added.) Id., p. 10,534, remarks of Representative Robert Farr. "[S]omebody who drinks and drives *ought to be tagged* . . . . This is probably one of the toughest drunk driving per se bills in the United States. . . . *Enough punishment* that you lose your license." (Emphasis added.) Id., pp. 10,546-47, remarks of Representative William Wollenberg. "[R]eceive *some punishment, without conviction* necessarily for drunk driving." (Emphasis added.) Id., p. 10,564, remarks of Representative Richard Tulisano. "[Y]our license may be suspended under certain circumstances, irrespective of the result of the criminal charges." 32 S. Proc., Pt. 12, 1989 Sess., p. 3978, remarks of Senator Anthony Avallone. "[This bill is] . . . *something stronger* than we have done by strictly our criminal laws, something that will use the *administrative process* in a prompt and sure fashion to make sure that those who drive and drink don't do so for very long." (Emphasis added.) Id., pp. 3984-85, remarks of Senator Richard Blumenthal.

With those statements I agree. Nevertheless, the question remains, did the legislators intend to combat this problem by quickly punishing offending individuals? And the answer to that query is yes; the legislature sought to employ the administrative process as a more expeditious means to punish individuals who drive while under the influence. This point was clearly articulated by then Senator Richard Blumenthal, whom the majority quotes in their opinion. Senator Blumenthal stated that "[this bill will do] . . . something stronger than we have done by strictly our criminal laws, something that will use the administrative process in a prompt and sure fashion to make sure that those who drive and drink don't do so for very long." 32 S. Proc., Pt. 12, 1989 Sess., pp. 3984-85.

Standing alone, there is nothing unconstitutional about punishing individuals by suspending their operator's licenses in order to deter driving while intoxicated. And, indeed, it may be very effective in solving a serious problem. The double jeopardy clause, however, forbids the imposition of a second successive sanction -- in this case, a criminal prosecution -- for the same offense.

I do not doubt the state's authority and obligation to deter persons from operating vehicles on the highways under conditions that threaten the lives of innocent third parties by revoking an individual's right to operate a vehicle. That authority, however, must be exercised in a manner that does not offend the double jeopardy clause of the United States constitution by meting out successive punishments for the same crime. Nor do I question the state's authority to suspend a license for purely remedial purposes, but that authority must be exercised in a manner in which it could logically be concluded that the sanction was enacted for a remedial purpose.

I conclude that the ninety day suspension period provided in §14-227b is punitive for double jeopardy purposes and

therefore the defendant's prosecution for operating under the influence must be dismissed.

Accordingly, I respectfully dissent.

APPENDIX B

Memorandum of Decision

State of Connecticut
Superior Court, Judicial District of New London

Docket No. MV 94-618025

STATE OF CONNECTICUT V. WENDY HICKAM
13 Conn. L. Rptr. 18, 571
(Argued: April 20, 1995 Decided: April 20, 1995)

MCMAHON, J.

The defendant has moved to dismiss the charge of "operating under the influence" in violation of Conn. Gen. Stat. 14-227a contending that such prosecution would be in violation of her fifth and fourteenth Amendments Rights of United States constitution and under Article I Section 8 of the Connecticut Constitution, "not to put twice in jeopardy for the same offense".

The sole issue contested is whether an "administrative per se driver's license suspension of ninety days under CGS 14-227b(h) qualifies as punishment for the purposes of double jeopardy?"[1]

The facts are undisputed by means of a stipulation that: the defendant's license was suspended for ninety days pursuant to 14a-227b(h) and she now faces criminal prosecution where the state seeks a conviction which could result in incarceration, fines and additional suspension of her license.

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1. The parties did not put on the record; in which manner the defendant violated (h).

The state by its arguments and brief has conceded that the administrative per se sanction was a separate proceeding for the same offense,[2] under the requirements of *United States v. Halper*, 490 U.S. 435, 109 S.Ct, 1892, 104 L.Ed.2d 487 (1989); *Austin v. United States*, 1135 S.Ct. 2801, 125 L.Ed.2d 488 (1993), and *Department of Revenue of Montana v. Kurth Ranch*, 114 S.Ct. 1937 (1994).

The court made inquiry of the state whether it intended to raise the *Blockburger* test and/or whether they challenged the defendant was not being punished for the same offense. The state declined to raise the issues. The court must agree with Judge Blue's conclusion in *Covelli v. Crystal*, 13 Conn.L.Rptr. No. 5, 148, 151 (January 30, 1995), that the United States Supreme Court was presented with the issue and summarily failed to mention the challenge in *Kurth Ranch*; and, therefore, is not applicable.

The Supreme Court has made it clear in the above, that ostensibly civil sanctions will be construed as punishments for double jeopardy purposes. *United States v. Halper*, supra (civil damages for the government); *Austin v. United States*, supra (civil land forfeiture); *Dept. of Revenue of Montana v. Kurth* (tax assessment on drug transactions).

However, originally the Court had not been as clear as to what test must be applied to determine when a civil sanction constitutes double jeopardy punishment.

The State argues that the *Halper* court meant that it would be a rare case when civil sanctions are deemed punishment and relies on the following: "What we announce now is a rule for the

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2. "The double jeopardy clause . . . And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 US 74, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1965).

rare case . . . The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss . . ." (emphasis added). Halper, supra, 1902.

The State contends that this means that any statute authorizing a civil sanction that in any way purports to or serves a remedial purpose should be sustained as nonpunishment for the purposes of the Fifth Amendment "double jeopardy."

Further, the State has submitted several other state decisions relying on the same analysis. See *Johnson v. State*, 95 Md.App. 561, 622 A.2d 199, 204-05 (1993); *Butter v. Department of Public Safety and Corrections*, 609 So.2d 790, 795-961 (La. 1992); *State v. Strong*, 605 A2d 510, 512-14 (Vt. 1992); *State v. Nichols*, 169 Ariz. 409, 819 P.2d 995, 998-1000 (Ariz.App. 1991). Most of these decisions involve license suspensions due to statutes concerning operation of a motor vehicle while intoxicated (more commonly DWI). Further, these cases are almost identical factually due to the need to conform to federal requirements for state traffic enforcements rules for receiving federal funds. In each instance the license suspensions were upheld as not punishment for double jeopardy.

The *Strong* court, supra, 513, illustrative of the others, reasoned that "the summary suspension scheme serves the rational remedial purpose of protecting public safety by quickly removing potentially dangerous drivers from the road."

This court notes well that all of these decisions were written prior to the *Austin* and *Kurth* cases; which clearly restate the first *Halper* inquiry on the issue of double jeopardy punishment.

"We said in *Halper* that 'a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be

explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' " (Emphasis added.) *Austin v. United States*, supra, 2806, quoting *United States v. Halper*, supra, 1448. "Fundamentally . . . '[a] civil sanction that cannot fairly be said solely to serve a remedial purpose but rather can only be explained as also serving either retributive or deterrent purposes, is punishment as we have come to understand the term.' " Id., 2812, quoting *United States v. Halper*, supra, 448.

"A defendant convicted and punished for an offense may not have a nonremedial civil penalty sanction imposed upon him for the same offense in a separate proceeding." *Dept. of Revenue of Montana v. Kurth*, supra 1945, citing *United States v. Halper*, supra.

Since the *Austin* decision in June 1993 it has been clear that the initial double jeopardy inquiry is whether a statute is solely remedial and not retributive or punitive. The notion that double jeopardy violations would be rare appears to be a mistatement by the Supreme Court. The Court itself has written two decisions within a year of each other finding double jeopardy violations; and dozens of lower court decisions have barred subsequent criminal prosecutions or civil sanctions.

The test of whether a statute is solely remedial has not been made clear. In these decisions, "*Halper* recognized that 'this constitutional right is intrinsically personal' and that only 'the character of the actual sanctions' can substantiate a possible double jeopardy violation." *Dept. of Revenue of Montana v. Kurth*, supra, 1946, quoting *United States v. Halper*, supra, 1901. "Whereas, fines, penalties and forfeitures are readily characterized as sanctions, taxes are typically different . . ." Id. "Yet, as the Chief Justice points out, tax statutes serve a purpose quite different from civil penalties, and *Halper's* method of determining whether exaction was remedial or punitive 'simply does not work

in the case of tax statute.' " Id. 1948, quoting dissenting opinion (Rehnquist, CJ, dissenting).

The *Kurth* court then went on an unusual features analysis of the Montana Tax Statute and rejected the legislature's stated contention that a civil tax for compensation for government fighting the war on drugs was remedial.

In *Austin* a civil forfeiture of property used or intended to be used in drug offenses was held as not payment to the government, but as punishment for some offense, even if the forfeiture served some remedial purpose. The Court did an exhaustive analysis of forfeiture historically and practically as being punitive in origin and action.

This court agrees with Judge Blue's reasoning in *Covelli v. Crystal*, 13 Conn.L.Rptr. No. 5, 148 (1995), that the court must apply a "totality of circumstance" analysis on a case to case basis. This appears to be mandated by United State Supreme Court decisions. "*Austin* asks that we establish a multifactor test for determining whether forfeiture is constitutionally excessive," Id., 2812.

The Supreme Court has given guidance, but no set rule.

"The notion of punishment, as we understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishments barred by the Double Jeopardy Clause, we must follow the notion where it leads." *United States v. Halper*, supra, 1901. "Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." Id. "[T]he determination . . . requires a particularized assessment of the penalty imposed and the purposes that the penalty may be fairly said to serve. Simply put, a civil as well as criminal sanction constitutes punishment when the sanction

as applied in the individual case serves the goals of punishment." Id., 1901-02.

Further, the court has rejected the contention that if the legislative history states a purported purpose, it may be fairly rejected if its result is clearly punishment. We must look to the entire scope of the statute, its stated purpose and legislative history, and how the machinery of governments actually works in the individual case. *Halper*, supra, 1901.

The Connecticut Appellate Court on one recent occasion has analyzed 14-227b(c), the immediate 24-hour license suspension revocation, and upheld it under a Bill of Attainder punishment test. *State v. Washburn*, 34 Conn.App. 557 (1994) (Double Jeopardy implications not discussed). There was clear dictum that the punishment was solely remedial to remove a presumptively drunk driver from the road and not for an excessive period. Id., 564.

The state contends this is akin to a finding that the 14-227b(c) license suspension given by the legislation is clearly focused on public safety and that 14-227b(h) is a mere extension of that accepted remedial purpose.

This court cannot agree; first, *Washburn* is not a double jeopardy analysis; second, the scope of the sanction is not comparable to the ninety-day suspension contained in 14-227b(h) (clearly the 24-hour provision goes to prevent someone shown to legally drunk or refusing the test to be kept off the roads for such a time that will assure that the individual has sobered up).

The Court agrees that 14-227b(h) does have the laudable intent of making our state roads safe, thus having some remedial purpose; however, after complete analysis of the legislative history, the mechanics of the statute, and how it is applied to individuals, this court concludes that the statute is punishment for

double jeopardy purposes because its actual effects are those of deterrence and punitive qualities.[3]

Historically, the Connecticut Statute was derived from a model comprehensive statute to deal with drunk driving accidents and deaths that are the scourge of our highways. The Court is well aware that unless provisions such as 14-227b(h) are in the state laws, the state will be deprived of government funding for highway construction and other public safety purposes.

The defendant here has been able to provide the court with six state decisions on the identical issue of the administrative per se license suspension. Of course, all six have sustained their position.

This court does not accept at face value these decisions, but agrees in large part with their analysis and conclusions. See, *State of Florida v. Ruby*, 95 LWUSA 61 at 17 (Jan. 10, 1995); *State of Idaho v. Bumgardner*, No. 94-0093E, Memorandum (Jan. 1995); *City of Salena v. Baer*, Municipal Court Salena, Kansas (Feb. 1995); *City of Seattle v. Savaria*, No. 21S56 King County, State of Washington (Feb. 1995) (defendant's brief); *State of Ohio v. Gustafson*, 94 LWUSA 1177 at 17 (Dec. 19, 1994).

For a complete understanding of the intent of purposes of the administrative per se sanction, the court must analyze its origins. As previously stated most states have taken the federal government's requirements and have applied it to state law. Connecticut is no exception. In Public Act 89-314, the contested provisions of 14-227b(h) were incorporated into the statute. Not coincidentally, at the same time, Connecticut was enacting the statute and the following occurred:

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3. This court has chosen not to test the statute under the State's argued rationally related test; however, the deterrent and punitive nature of the statute is so clear that it is unlikely that statute would survive under that analysis.

A statement by Steve Blackstone of the National Transportation Safety Board before the House Judiciary Committee on February 15, 1989 articulated this dual purpose:

> Administrative license revocation is essentially a variation of traditional license suspension or revocation. Because these license actions known to be effective in reducing both crashes and violations, it is reasonable to believe that administrative revocation likewise will be effective. Furthermore, it meets all three criteria for effective sanctions postulated by drunk driving deterrence theory: it is viewed by drivers as a severe sanction; it can be invoked with certainty, and, it goes into effect shortly after arrest. It has a direct effect on public perceptions. It also has the advantage of being a less costly sanction for society than other countermeasures such as jail sentences.
>
> In summary, the effects of the administrative license revocation are twofold--the licenses of dangerous drivers are revoked more quickly, and the certainty of receiving a penalty for drunk driving is dramatically increased .

These same purposes are echoed in the Legislative History of PA 89- 314.

Before the Judiciary Committee Considering House Bill H.B. 5097 March 20, 1989;

Laughlin McClear (Chairman Governors Task for Driving While Intoxicated);

"In support . . . Per Se License suspension: "

P. 1552 --Well the federal standards, I believe are 90 days.

P. 1539 It adds greatly to the deterrent effect.

P. 1542 I suspect the deterrent effect is very great.

P. 1548 Rep. Wollenberg . . . You know I don't think the proof is there that this really does the job and to throw out the rights ...

P. 1546 Rep. Wollenberg . . . I agree that one of the strongest deterrents we have is to take somebody's license . . .

P. 1550 Sen. Avallone . . . I understand that a quick suspension of the license was, under the studies an important factor in deterring crime.

P. 1552 Sen. Avallone . . . It ought to be for a sufficient period of time to create a substantial impact.

P. 1552 Rep. Niutz . . . So isn't that in effect a better deterrent than this bill?

P. 1558 Rep. Lawlor . . . Would it surprise you if I said that a 90 day suspension of someone's driver's license is probably among the most, in terms of numbers, among the most severe penalties that are dolled (sic) out in our court system today?

P. 1639 Statement of Laughlin M. McClean, Chairman of Governor's Task Force on Driving While Intoxicated in Support of Bill No. 5097--Per Se License suspension. The advantages of administrative license suspension can be summarized as follows:

> Loss of license is swift and sure, adding greatly to the deterrent effect . . .

House of Representatives, May 30, 1989.

P. 10518 Rep. Tulisano . . . You have before us an administrative per se license suspension which, in my opinion, is a very strong bill. It penalizes people stronger than any thing we have seen here if punishment is the answer.

P. 10522 Rep. Prague . . . A bill that has proven to be an effective deterrent to drunk driving in the 23 states in which it now exists.

P. 10523 Rep. Miutz . . . Will act as a deterrent.

P. 1563 Sen. Avallone . . . Is a hard hitting attempt to deal with drunk driving in our state.

The Legislative stated purpose is clearly meant in a large part to be punishment and deterrent.

Further, a driver's license has been given such value as a constitutionally protected right which cannot be suspended or revoked without due process of law. *State v. Washburn*, supra, 565, citing *United States v. Brunson*, 402 U.S. 535, 542-43. (1977).

The Court is well familiar with the actual working of 14-227b(h) and other motor vehicle criminal charges that result in license suspensions. In the thousands of pretrials conducted by the court, defense attorneys or pro se's resist the actual suspensions more than even short jail sentences or major fines (i.e. the same 14-227a charge contested here).

Often, these are the most difficult cases to bring to a pretrial disposition. Defendants cannot bring themselves to accept losing their license; whether it is the thirty-day suspension for a Reckless Driving conviction or the one-year suspension of first time Operating Under the Influence conviction.

The reason is clear; the very livelihood of the person or their family may be dependent on their ability to operate a motor vehicle. A motor vehicle license can be more valuable than some time in jail, large fines or many hours of community service. As a practical matter, the court cannot reach any other conclusion than that 14-227b(h) as applied is a penalty and deterrent of great magnitude. A ninety-day suspension would operate as a great hardship to any defendant and, therefore, they have been punished for the purpose of double jeopardy.

The Motion to Dismiss is granted due to the Constitutional Violation of Double Jeopardy Protections.

APPENDIX C

C.G.S. §14-227a. Operation while under the influence of liquor or drug or while impaired by liquor.

(a) **Operation while under the influence.** No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if he operates a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been established in accordance with the provisions of section 14-218a, or in any parking area for ten or more cars or on any school property (1) while under the influence of intoxicating liquor or any drug or both or (2) while the ratio of alcohol in the blood of such person is ten-hundredths of one per cent or more of alcohol, by weight.

(b) **Operation while impaired.** No person shall operate a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been established in accordance with the provisions of section 14-218a, or in any parking area for ten or more cars or on any school property while his ability to operate such motor vehicle is impaired by the consumption of intoxicating liquor. A person shall be deemed impaired when at the time of the alleged offense the ratio of alcohol in the blood of such person was more than seven-hundredths of one per cent of alcohol, by weight, but less than ten-hundredths of one per cent of alcohol, by weight.

(c) **Admissibility of chemical analysis.** Except as provided in subsection (d) of this section, in any criminal prosecution for violation of subsection (a) or (b) of this section, evidence respecting the amount of alcohol or drug in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's breath, blood or urine shall be admissible and competent provided: (1) The defendant was afforded a reasonable opportunity to telephone an attorney prior to the performance of the test and consented to the taking of the test upon which such analysis is made; (2) a true copy of the report of the test result was mailed to or personally delivered to the defendant within twenty-four hours or by the end of the next regular business day, after such result was known, whichever is later; (3) the test was performed by or at the direction of a police officer according to methods and with equipment approved by the department of public health and addiction services and was performed by a person certified or recertified for such purpose by said department or recertified by persons certified as instructors by the commissioner of public health and addiction services. If a blood test is taken, it shall be on a blood sample taken by a person licensed to practice medicine and surgery in this state, a phlebotomist, a qualified laboratory technician, an emergency medical technician II or a registered nurse; (4) the device used for such test was checked for accuracy immediately before and after such test was performed by a person certified by the department of public health and addiction services; (5) an additional chemical test of the same type was performed at least thirty minutes after the initial test was performed, provided however the results of the initial test shall not be inadmissible under this subsection if reasonable efforts were made to have such additional test performed in accordance with the conditions set forth in this subsection and such additional test was not performed or was not performed within a reasonable time, or the results of such additional test are not admissible for failure to meet a condition set forth in this subsection; and (6) evidence is presented that the test was commenced within two hours of operation. In any

prosecution under this section it shall be a rebuttable presumption that the results of such chemical analysis establish the ratio of alcohol in the blood of the defendant at the time of the alleged offense, except that if the results of the additional test indicate that the ratio of alcohol in the blood of such defendant is twelve-hundredths of one per cent or less of alcohol, by weight, and is higher than the results of the first test, evidence shall be presented that demonstrates that the test results and the analysis thereof accurately indicate the blood alcohol content at the time of the alleged offense.

(d) **Evidence of blood alcohol content.** In any prosecution for a violation of subdivision (1) of subsection (a) of this section, reliable evidence respecting the amount of alcohol or drugs in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's blood, breath or urine, otherwise admissible under subsection (c) of this section, shall be admissible only at the request of the defendant.

(e) **Certification of methods and types of chemical tests.** The commissioner of public health and addiction services shall ascertain the reliability of each method and type of device offered for chemical testing purposes of blood, of breath and of urine and certify those methods and types which he finds suitable for use in testing blood, in testing breath and in testing urine in this state. He shall adopt regulations governing the conduct of chemical tests, the operation and use of chemical test devices and the training, certification and annual recertification of operators of such devices as he finds necessary to protect the health and safety of persons who submit to chemical tests and to insure reasonable accuracy in testing results. Such regulations shall not require recertification of a police officer solely because such officer terminates his employment with the law enforcement agency for which certification was originally issued and commences employment with another such agency.

(f) **Evidence of refusal to submit to test.** In any criminal prosecution for a violation of subsection (a) or (b) of this section, evidence that the defendant refused to submit to a blood, breath or urine test requested in accordance with section 14-227b shall be admissible provided the requirements of subsection (b) of said section have been satisfied. If a case involving a violation of subsection (a) of this section is tried to a jury, the court shall instruct the jury as to any inference that may or may not be drawn from the defendant's refusal to submit to a blood, breath or urine test.

(g) **Reduction, nolle or dismissal prohibited.** If a person is charged with a violation of the provisions of subsection (a) of this section, the charge may not be reduced, nolled or dismissed unless the prosecuting authority states in open court his reasons for the reduction, nolle or dismissal.

(h) **Penalties for operation while under the influence.** Any person who violates any provision of subsection (a) of this section shall: (1) For conviction of a first violation, (A) be fined not less than five hundred dollars nor more than one thousand dollars and (B) be (i) imprisoned not more than six months, forty-eight consecutive hours of which may not be suspended or reduced in any manner or (ii) imprisoned not more than six months, with the execution of such sentence of imprisonment suspended entirely and a period of probation imposed requiring as a condition of such probation that such person perform one hundred hours of community service, as defined in section 14-227e, and (C) have his motor vehicle operator's license or nonresident operating privilege suspended for one year; (2) for conviction of a second violation within five years after a prior conviction for the same offense, be fined not less than five hundred dollars nor more than two thousand dollars and imprisoned not more than one year, ten consecutive days of which may not be suspended or reduced in any manner, and have his motor vehicle operator's license or

nonresident operating privilege suspended for two years; (3) for conviction of a third violation within five years after a prior conviction for the same offense, be fined not less than one thousand dollars nor more than four thousand dollars and imprisoned not more than two years, one hundred twenty consecutive days of which may not be suspended or reduced in any manner, and have his motor vehicle operator's license or nonresident operating privilege suspended for three years; and (4) for conviction of a fourth and subsequent violation within five years after a prior conviction for the same offense, be fined not less than two thousand dollars nor more than eight thousand dollars and imprisoned not more than three years, one year of which may not be suspended or reduced in any manner, and have his motor vehicle operator's license or nonresident operating privilege permanently revoked upon such fourth offense. For purposes of the imposition of penalties for a second, third or fourth and subsequent offense pursuant to this subsection, a conviction under the provisions of subsection (a) of section 14-227a in effect on October 1, 1981, or as amended thereafter, a conviction under the provisions of either subdivision (1) or (2) of subsection (a) of this section or a conviction under the provisions of section 53a-56b or 53a-60d shall constitute a prior conviction for the same offense.

(i) **Penalties for operation while impaired.** Any person who violates subsection (b) of this section shall have committed an infraction.

(j) **Suspension of operator's license.** (1) The suspension of a motor vehicle operator's license or nonresident operating privilege imposed under subsection (h) of this section shall take effect immediately upon the expiration of any period in which an appeal of any conviction under subsection (a) of this section may be taken; provided if an appeal is taken, the suspension shall be stayed during the pendency of such appeal. If the suspension takes effect, the defendant shall immediately

send his motor vehicle operator's license or nonresident operating privilege to the department of motor vehicles. (2) The motor vehicle operator's license or nonresident operating privilege of a person found guilty under subsection (a) of this section who is under eighteen years of age shall be suspended for the period of time set forth in subsection (h) of this section, or until such person attains the age of eighteen years, whichever period is longer. (3) The motor vehicle operator's license or nonresident operating privilege of a person found guilty under subsection (a) of this section who, at the time of the offense, was operating a motor vehicle in accordance with a special operator's permit issued pursuant to section 14-37a shall be suspended for twice the period of time set forth in subsection (h) of this section.

(k) **Participation in alcohol education and treatment program.** In addition to any fine or sentence imposed pursuant to the provisions of subsection (h) of this section, the court may order such person to participate in an alcohol education and treatment program.

(l) **Seizure and admissibility of chemical analysis of blood sample of injured operator.** Notwithstanding the provisions of subsection (c) of this section, evidence respecting the amount of alcohol or drug in the blood of an operator of a motor vehicle involved in an accident who has suffered or allegedly suffered physical injury in such accident, which evidence is derived from a chemical analysis of a blood sample taken from such person after such accident at the scene of the accident, while en route to a hospital or at a hospital, shall be competent evidence to establish probable cause for the arrest by warrant of such person for a violation of subsection (a) of this section and shall be admissible and competent in any subsequent prosecution thereof if: (1) The blood sample was taken for the diagnosis and treatment of such injury; (2) the blood sample was taken by a person licensed to practice medicine in this state,

a resident physician or intern in any hospital in this state, a phlebotomist, a qualified laboratory technician, an emergency medical technician II or a registered nurse; (3) a police officer has demonstrated to the satisfaction of a judge of the superior court that such officer has reason to believe that such person was operating a motor vehicle while under the influence of intoxicating liquor or drug or both and that the chemical analysis of such blood sample constitutes evidence of the commission of the offense of operating a motor vehicle while under the influence of intoxicating liquor or drug or both in violation of subsection (a) of this section; and (4) such judge has issued a search warrant in accordance with section 54-33a authorizing the seizure of the chemical analysis of such blood sample.

(m) **"Phlebotomist" defined.** For the purpose of this section, "phlebotomist" means a staff member of a hospital, licensed under chapter 368v, who performs venipunctures to obtain blood samples as ordered by a licensed physician and is under the jurisdiction of the chief of pathology.

APPENDIX D

C.G.S. §14-227b. Implied consent to test. Suspension of license for refusing to submit to test or having elevated blood alcohol content. Hearing.

(a) Any person who operates a motor vehicle in this state shall be deemed to have given his consent to a chemical analysis of his blood, breath or urine and, if said person is a minor, his parent or parents or guardian shall also be deemed to have given his consent.

(b) If any such person, having been placed under arrest for manslaughter in the second degree with a motor vehicle or assault in the second degree with a motor vehicle or for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both or while his ability to operate such motor vehicle is impaired by the consumption of intoxicating liquor, and thereafter, after being apprised of his constitutional rights, having been requested to submit to a blood, breath or urine test at the option of the police officer, having been afforded a reasonable opportunity to telephone an attorney prior to the performance of such test and having been informed that his license or nonresident operating privilege will be suspended in accordance with the provisions of this section if he refuses to submit to such test or if he submits to such test and the results of such test indicate that the ratio of alcohol in his blood was ten-hundredths of one per cent or more of alcohol, by weight, and that evidence of any such refusal shall be admissible in accordance with subsection (f) of section 14-227a and may be used against him in any criminal prosecution, refuses to submit to the designated test, the test shall not be given; provided, if the person refuses or is unable to submit to a blood test, the police officer shall designate the breath or urine test as the test to be taken. The police officer shall make a notation upon the records of the police department

that he informed the person that his license or nonresident operating privilege would be suspended if he refused to submit to such test or if he submitted to such test and the results of such test indicated that the ratio of alcohol in his blood was ten-hundredths of one per cent or more of alcohol, by weight.

(c) If the person arrested refuses to submit to such test or analysis or submits to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicate that the ratio of alcohol in the blood of such person is ten-hundredths of one per cent or more of alcohol, by weight, the police officer, acting on behalf of the commissioner of motor vehicles, shall immediately revoke and take possession of the motor vehicle operator's license or, if such person is a nonresident, suspend the nonresident operating privilege of such person, for a twenty-four-hour period and shall issue a temporary operator's license or nonresident operating privilege to such person valid for the period commencing twenty-four hours after issuance and ending thirty days after the date such person received notice of his arrest by the police officer. The police officer shall prepare a written report of the incident and shall mail the report together with a copy of the completed temporary license form, any operator's license taken into possession and a copy of the results of any chemical test or analysis to the department of motor vehicles within three business days. The report shall be made on a form approved by the commissioner of motor vehicles and shall be subscribed and sworn to under penalty of false statement as provided in section 53a-157b by the arresting officer. If the person arrested refused to submit to such test or analysis, the report shall be endorsed by a third person who witnessed such refusal. The report shall set forth the grounds for the officer's belief that there was probable cause to arrest such person for manslaughter in the second degree with a motor vehicle or assault in the second degree with a motor vehicle or for operating a motor vehicle while under the influence of intoxicating liquor or any drug or both or while his ability to

operate such motor vehicle is impaired by the consumption of intoxicating liquor, and shall state that such person had refused to submit to such test or analysis when requested by such police officer to do so or that such person submitted to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that the ratio of alcohol in the blood of such person was ten-hundredths of one per cent or more of alcohol, by weight.

(d) Upon receipt of such report, the commissioner of motor vehicles shall suspend any license or nonresident operating privilege of such person effective as of a date certain, which date shall be not later than thirty days after the date such person received notice of his arrest by the police officer. Any person whose license or operating privilege has been suspended in accordance with this subsection shall automatically be entitled to a hearing before the commissioner to be held prior to the effective date of the suspension. The commissioner shall send a suspension notice to such person informing such person that his operator's license or nonresident operating privilege is suspended as of a date certain and that he is entitled to a hearing prior to the effective date of the suspension and may schedule such hearing by contacting the department of motor vehicles not later than seven days after the date of mailing of such suspension notice.

(e) If such person does not contact the department to schedule a hearing, the commissioner shall affirm the suspension contained in the suspension notice for the appropriate period specified in subsection (h) of this section.

(f) If such person contacts the department to schedule a hearing, the department shall assign a date, time and place for the hearing, which date shall be prior to the effective date of the suspension. At the request of such person or the hearing officer and upon a showing of good cause, the commissioner may grant one continuance for a period not to

exceed fifteen days. If a continuance is granted, the commissioner shall extend the validity of the temporary operator's license or nonresident operating privilege issued pursuant to subsection (c) of this section for a period not to exceed the period of such continuance. The hearing shall be limited to a determination of the following issues: (1) Did the police officer have probable cause to arrest the person for manslaughter in the second degree with a motor vehicle or for assault in the second degree with a motor vehicle or for operating a motor vehicle while under the influence of intoxicating liquor or drug or both or while his ability to operate such motor vehicle was impaired by the consumption of intoxicating liquor; (2) was such person placed under arrest; (3) did such person refuse to submit to such test or analysis or did such person submit to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that the ratio of alcohol in the blood of such person was ten-hundredths of one per cent or more of alcohol, by weight; and (4) was such person operating the motor vehicle. In the hearing, the results of the test or analysis shall be sufficient to indicate the ratio of alcohol in the blood of such person at the time of operation, except that if the results of the additional test indicate that the ratio of alcohol in the blood of such person is twelve-hundredths of one per cent or less of alcohol, by weight, and is higher than the results of the first test, evidence shall be presented that demonstrates that the test results and analysis thereof accurately indicate the blood alcohol content at the time of operation. The fees of any witness summoned to appear at the hearing shall be the same as provided by the general statutes for witnesses in criminal cases.

(g) If, after such hearing, the commissioner finds on any one of the said issues in the negative, the commissioner shall reinstate such license or operating privilege. If, after such hearing, the commissioner does not find on any one of the said issues in the negative or if such person fails to appear at such hearing, the commissioner shall affirm the suspension contained

in the suspension notice for the appropriate period specified in subsection (h) of this section. The commissioner shall render a decision at the conclusion of such hearing or send a notice of his decision by bulk certified mail to such person not later than thirty days or, if a continuance is granted, not later than forty-five days from the date such person received notice of his arrest by the police officer. The notice of such decision sent by certified mail to the address of such person as shown by the records of the commissioner shall be sufficient notice to such person that his operator's license or nonresident operating privilege is reinstated or suspended, as the case may be. Unless a continuance of the hearing is granted pursuant to subsection (f) of this section, if the commissioner fails to render a decision within thirty days from the date such person received notice of his arrest by the police officer, the commissioner shall reinstate such person's operator's license or nonresident operating privilege, provided notwithstanding such reinstatement the commissioner may render a decision not later than two days thereafter suspending such operator's license or nonresident operating privilege.

(h) The commissioner shall suspend the operator's license or nonresident operating privilege, and revoke the temporary operator's license or nonresident operating privilege issued pursuant to subsection (c) of this section, of a person who did not contact the department to schedule a hearing, who failed to appear at a hearing or against whom, after a hearing, the commissioner held pursuant to subsection (g) of this section, as of the effective date contained in the suspension notice or the date the commissioner renders his decision, whichever is later, for a period of: (1) (A) Ninety days, if such person submitted to a test or analysis and the results of such test or analysis indicated that the ratio of alcohol in the blood of such person was ten-hundredths of one per cent or more of alcohol, by weight, or (B) six months if such person refused to submit to such test or analysis, (2) one year if such person has previously had his operator's license or nonresident operating privilege

suspended under this section, and (3) two years if such person has two or more times previously had his operator's license or nonresident operating privilege suspended under this section.

(i) The provisions of this section shall apply with the same effect to the refusal by any person to submit to an additional chemical test as provided in subdivision (5) of subsection (c) of section 14-227a.

(j) The provisions of this section shall not apply to any person whose physical condition is such that, according to competent medical advice, such test would be inadvisable.

(k) The state shall pay the reasonable charges of any physician who, at the request of a municipal police department, takes a blood sample for purposes of a test under the provisions of this section.

(l) The commissioner of motor vehicles shall adopt regulations in accordance with chapter 54 to implement the provisions of this section.